

REMARKS

This is a full and timely response to the outstanding non-final Office Action mailed June 7, 2004 (Paper No. 6). Upon entry of this response, claims 49-93 are pending in the application. In this response, claims 49, 52, 56, 60, 63, 67, and 71 have been amended, claims 75-93 have been added, and claims 1-48 have been cancelled. Applicants respectfully request that the amendments being filed herewith be entered and request that there be reconsideration of all pending claims.

1. Rejection of Claims 3, 17-19, 27-29, 34, 37, 40, 43, 46, 49, 52-53, 56-57, 60, 63-64, 67-68, and 71-72 under 35 U.S.C. §103

Claims 3, 17-19, 27-29, 34, 37, 40, 43, 46, 49, 52-53, 56-57, 60, 63-64, 67-68, and 71-72 have been rejected under §103(a) as allegedly obvious over *Maxwell et al.* (U.S. 4,771,417) in view of *Frick et al.* (U.S. 5,473,676).

a. Rejection of Claims 3, 17-19, 27-29, 34, 37, 40, 43, and 46

Claims 3, 17-19, 27-29, 34, 37, 40, 43, and 46 are cancelled without prejudice, waiver, or disclaimer, and the rejection of these claims is therefore rendered moot. Applicants take this action merely to reduce the number of disputed issues and to facilitate early allowance and issuance of other claims in the present application. Applicants reserve the right to pursue the subject matter of these cancelled claims in a continuing application, if Applicants so choose, and do not intend to dedicate any of the cancelled subject matter to the public.

b. Rejection of Claims 49, 52, 56, 60, 63, 67 and 71

Applicants respectfully traverse these rejections. It is well established at law that, for a proper rejection of a claim under 35 U.S.C. §103 as being obvious based upon a combination of references, the cited combination of references must disclose, teach, or suggest, either implicitly,

all elements/features/steps of the claim at issue. *See, e.g., In re Dow Chemical*, 5 U.S.P.Q.2d 1529, 1531 (Fed. Cir. 1988); *In re Keller*, 208 U.S.P.Q.2d 871, 881 (C.C.P.A. 1981). Applicants respectfully submit that claims 49, 52, 56, 60, 63, 67 and 71 are allowable for at least the reason that the proposed combination of *Maxwell et al.* in view of *Frick et al.* does not disclose, teach, or suggest at least the feature of “determining that there is a periodic transient” as recited in claims 49, 52, 56, 60, 63, 67 and 71.

Maxwell et al. does not disclose, teach, or suggest using at least “determining that there is a periodic transient.” *Maxwell et al.* discloses a modem which monitors the quality of data transmission, as measured by data errors and a retransmit frame ratio, and adjusts transmission rate based on this quality. (Col. 20, lines 5-18; and lines 30-45). Applicants respectfully submit that data errors are not equivalent to transients. Although some transients result in data errors and retransmissions, other transients do not, and there are various other reasons for data errors other than transients. *Maxwell et al.* contains no discussion whatsoever of transient detection, either periodic or non-periodic. In fact, the only occurrence in *Maxwell et al.* of the word “transient” is in a parts list (“SUPPRESSOR, TRANSIENT, 6V + -10%”, Col. 18, line 25). Thus, *Maxwell et al.* fails to disclose, teach, or suggest every element of the Applicant’s claimed invention.

Frick et al. also fails to teach, suggest or disclose at least “determining that there is a periodic transient.” *Frick et al.* contains a brief discussion of a tone detector (“modem 24 includes tone detected adapted to detect a start tone defined by frequencies of 2312.5 Hz and 2912.5 Hz for approximately 200 msec,” Col. 7, lines 53-56) and another brief discussion of the detecting incoming tones (“processor 30 sets up its modem 24 at step 510 to detect incoming speed tones,” Col. 11, lines 55-56). However, Applicants respectfully assert that a single tone

disclosed in *Frick et al.* is not equivalent to a “periodic transient” as recited in claims 49, 52, 56, 60, 63, 67 and 71. Thus, *Frick et al.* fails to disclose, teach, or suggest every element of the Applicant’s claimed invention.

Accordingly, the proposed combination of *Maxwell et al.* in view of *Frick et al.* does not teach at least the claimed limitations of “determining that there is a periodic transient” as recited in claims 49, 52, 56, 60, 63, 67 and 71. Since the proposed combination of *Maxwell et al.* in view of *Frick et al.* does not teach at least the above-described features recited in claims 49, 52, 56, 60, 63, 67 and 71, a *prima facie* case establishing an obviousness rejection by *Maxwell et al.* in view of *Frick et al.* has not been made. Thus, claims 49, 52, 56, 60, 63, 67 and 71 are not obvious under the proposed combination of *Maxwell et al.* in view of *Frick et al.*, and the rejection should be withdrawn.

c. Claims 53, 57, 64, 68, and 72

Since claims 49, 52, 56, 60, 63, 67 and 71 are allowable, Applicants respectfully submit that claims 53, 57, 64, 68, and 72 are allowable for at least the reason that each depends from an allowable claim. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). Therefore, Applicants respectfully request that the rejection of claims 53, 57, 64, 68, and 72 be withdrawn.

2. Rejection of Claims 34, 37, 40, 43, 46, 53, 57, 64, 68, and 72 under 35 U.S.C. §103

Claims 34, 37, 40, 43, 46, 53, 57, 64, 68, and 72 have been rejected under §103(a) as allegedly obvious over *Maxwell et al.* (U.S. 4,771,417) in view of *Frick et al.* (U.S. 5,473,676).

a. Claims 34, 37, 40, 43, and 46

Claims 34, 37, 40, 43, and 46 are cancelled without prejudice, waiver, or disclaimer, and the rejection of these claims is therefore rendered moot. Applicants take this action merely to reduce the number of disputed issues and to facilitate early allowance and issuance of other claims in the present application. Applicants reserve the right to pursue the subject matter of these cancelled claims in a continuing application, if Applicants so choose, and do not intend to dedicate any of the cancelled subject matter to the public.

b. Claims 53, 57, 64, 68, and 72

Since claims 49, 52, 56, 60, 63, 67 and 71 are allowable, Applicants respectfully submit that claims 53, 57, 64, 68, and 72 are allowable for at least the reason that each depends from an allowable claim. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q. 2d 1596, 1598 (Fed. Cir. 1988). Therefore, Applicants respectfully request that the rejection of claims 53, 57, 64, 68, and 72 be withdrawn.

3. Newly Added Claims

Applicants submit that no new matter has been added in the new claims 75-93 and that new claims 75-93 are allowable over the cited prior art. Specifically, Applicants respectfully assert that independent claims 75 and 82 are allowable for at least the reason that the cited prior art does not teach, disclose, or suggest “detecting a transient; responsive to the detecting, collecting data related to one or more subsequent transients that occur over a first predetermined length of time; calculating, based on the collected data, a second time for rate adjustment.” Finally, Applicants respectfully assert that independent claim 89 is allowable for at least the reason that the cited prior art does not teach, disclose, or suggest “means for detecting a transient; means for collecting data, responsive to the detecting, said data related to one or more

subsequent transients that occur over a first predetermined length of time.” Therefore,
Applicants request that the Examiner enter and allow the above new claims.

CONCLUSION

Applicants respectfully request that all outstanding objections and rejections be withdrawn and that this application and presently pending claims 49-93 be allowed to issue. If the Examiner has any questions or comments regarding Applicants' response, the Examiner is encouraged to telephone Applicants' undersigned counsel.

Respectfully submitted,

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